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Suppressing Speech in Judicial Elections: How the Canons of Judicial Ethics Abridge the Freedom of Speech of Judges and Candidates for Judicial Office

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SUPPRESSING SPEECH IN JUDICIAL ELECTIONS: HOW THE CANONS OF JUDICIAL ETHICS ABRIDGE THE FREEDOM OF SPEECH OF JUDGES AND CANDIDATES FOR JUDICIAL OFFICE

*Bradley S. Clanton**

I. INTRODUCTION

Popular elections are currently used by thirty-four states for the selection or retention of most trial and appellate court judges.[1] Almost all of these states have adopted ethical rules, based either on the ABA's 1972 Code of Judicial Conduct or 1990 Model Code of Judicial Conduct, which effectively prohibit all candidates for judicial office from discussing political or legal issues during the elections.[2]

An objective observer viewing this state of affairs would likely conclude that something is absurdly wrong with the judicial selection processes in these states. If judicial candidates cannot discuss disputed legal and political issues, what are they to discuss during their campaigns? Put another way, if candidates for judicial office are prohibited from discussing legal or political issues, what criteria are those selecting judges to use in determining whether a candidate is qualified to hold judicial office?

Surely the electorate, in order to make informed choices, should hear more from judicial candidates than biographical information such as where they went to law school, who they married, where they work, what clubs they belong to, and where they go (or do not go) to church. Indeed, some studies suggest that in the absence of information regarding the candidates' views on legal or political issues, voters will rely on arbitrary factors such as the sound of the candidate's name, the location of the candidate on the ballot, whether the candidate is the incumbent, and whether the candidate's name suggests a particular ethnic origin.[3]

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1. Twenty-five states utilize popular elections for the selection of all judges. *See* ARK. CONST. art. 7, §§ 6, 17; CAL. CONST. art. VI, § 16; FLA. CONST. art. V, § 10; GA. CONST. art. VI, § VII, para. I; IDAHO CONST. art. VI, § 7; ILL. CONST. art. VI, § 12; KAN. CONST. art. 3, § 6; KY. CONST. § 117; LA. CONST. art. V, § 22; MICH. CONST. art. VI, §§ 2, 8, 12; MISS. CONST. art. 6, § 145; MONT. CONST. art. VII, § 8; NEV. CONST. art. 6, §§ 3, 5; N.M. CONST. art. VI, § 33; N.C. CONST. art. IV, §§ 9-10, 16; N.D. CONST. art. 6, §§ 7, 9; OHIO CONST. art. IV, § 6; OKLA. CONST. art. VII,§ 3; OR. CONST. art. VII, § 1; PA. CONST. art. 5, § 13; TENN. CONST. art. VI, §§ 3-4; TEX. CONST. art. V, §§ 2, 7; WASH. CONST. art. IV, §§ 3, 5; W. VA. CONST. art. VIII, §§ 2, 5; WIS. CONST. art. VII, § 9.

Nine states select judges with both elective and appointive methods. *See* ALA. CONST. art. VI, §§ 152-153; CONN. CONST. art. V, § 2; IND. CONST. art. 7, §§ 7, 10-11; ME. CONST. art. 6, § 6 & art. 5, pt. 1, § 8; MINN. CONST. art. 6, § 7 & MINN. STAT. § 480B.01 (2001); MO. CONST. art. 5, § 25; N.Y. CONST. art. VI, §§ 2, 6, 9; S.D. CONST. art. V, § 7; VT. CONST. §§ 32, 50-51.

Only sixteen states utilize appointment for the selection of all judges. *See* ALASKA STAT. §§ 22.10.100, 22.15.170, 22.05.080 (Michie 2001); ARIZ. CONST. art. 6, §§ 37, 40, 42; COLO. CONST. art. VI, § 20; DEL. CONST. art. IV, § 31; HAW. CONST. art. VI, § 3; IOWA CONST. art. V, § 17; MD. CONST. art. IV, § 3; MASS. CONST. ch. III, art. I; NEB. CONST. art. 5, § 21; N.H. CONST. pt. 2, art. 46; N.J. CONST. art 6, § VI, para. 1; R.I. CONST. art. X, § 4; S.C. CONST. art. V, §§ 3, 8, 13, 18; UTAH CONST. art. VIII, § 8; VA. CONST. art. VI, § 7; WYO. CONST. art. 5, § 4.

2. *See* discussion *infra,* pp. 8-10.

3. *See* HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS 46-47 (1992); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?,* 23 FLA. ST. U. L. REV. 1, 26 (1995).

Those who defend the speech restrictions on judicial candidates argue that the restrictions are necessary to maintain the actual or perceived integrity, impartiality, independence, and fairness of the judiciary. The purpose of this article is to examine these judicial speech restrictions in detail, and to demonstrate that they are not necessary to maintain the actual or perceived impartiality of the judiciary. The article will also show that these restrictions arose not out of concern for the actual or perceived impartiality of state court judges, but out of the ABA's general distaste for electing judges, coupled with its realization that judicial elections are not likely to cease. Next, the article will demonstrate that the restrictions violate the First Amendment rights of candidates for judicial office, as the restrictions do not serve to maintain the actual or perceived impartiality and independence of the judiciary, and are not narrowly tailored as required by the First Amendment. Finally, the article will discuss more narrowly tailored proposals that may serve the asserted interests in preserving the actual or perceived impartiality, integrity, fairness, and independence of the judiciary, without violating the free speech rights of candidates for judicial office.

II. THE MODEL CODE

For almost two centuries there were no systematic efforts to regulate the speech and conduct of judges in the United States. Indeed, under the common law practice at the time of the American Founding, not only were the speech and conduct of judges unregulated, the *only* ground for disqualifying a judge was for financial interest in the cause.[4] Even *bias* against or in favor of a party did not disqualify a judge from sitting in a particular case.[5] And the fact that a judge had publicly expressed an opinion upon the issues in a case did not disqualify the judge from acting in that case.[6]

The first attempt to regulate the speech and conduct of judges occurred in 1924, with the publication of the ABA's Canons of Judicial Ethics.[7] The 1924 Canons were not intended to be an enforceable code, however, but were designed to reflect the "ideal conduct" of a judge.[8] For example, the 1924 Canons exhorted candidates for judicial office not to make "promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power."[9] A candidate for judicial office was also encouraged not to "announce in advance

4. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORICAL IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 87 (1993).

5. *See id. e.g.*,

6. *See*, North River Steamboat Co. v. Livingston, 3 Cow. 713 (N.Y. 1825).

7. *See generally* Matthew J. O'Hara, *Note, Restriction of Judicial Election Candidates Free Speech Rights After Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT L. REV. 197, 211-212 (1994). Some scholars have said that the 1924 Canons grew out of a baseball scandal known as the "Black Sox" scandal, in which members of the Chicago White Sox were alleged to have thrown the 1919 World Series to the Cincinnati Reds. *See* JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, Foreward, at vii (1995) (citing JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 180-82 (1974)). Baseball officials hired United States District Judge Kenesaw Mountain Landis as a national commissioner of baseball associations, in an apparent attempt to build respectability, and Judge Landis continued serving as judge, at a salary of $7,500 per year, while serving as the "baseball czar," at a salary of $42,500 per year. In 1921 the ABA passed a resolution censuring Judge Landis and appointing a committee to promulgate ethical standards for judges. *Id.*

8. *See* SHAMAN, *supra* note 7, § 1.02, at 3; O'Hara, *supra* note 7, at 211.

9. CANONS OF JUDICIAL ETHICS, CANON 30 (1924).

his conclusions of law on disputed issues to secure class support," or to do anything which would "create the impression that if chosen, he will administer his office with bias, partiality, or improper discrimination."[10]

In 1969 the president of the ABA proposed that the ABA reexamine the 1924 Canons, and the result of that reexamination was the 1972 Code of Judicial Conduct.[11] Unlike the 1924 Canons, however, the 1972 Code was intended to be enforceable.[12] Canon 7 of the 1972 Code prohibits judges from engaging in "inappropriate" political activity, including holding office in political organizations.[13] Canon 7 also contains broad restrictions on the conduct of judicial candidates during elections, and includes the following restrictions with respect to campaign speech:

> (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election . . . (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office; announce his views on disputed legal or political issues . . . .[14]

The first of these prohibitions has been described as the "pledges or promises clause," and the second as the "announce clause."[15] Provisions similar to these are still in effect in many states.[16]

The ABA's stated purpose in including Canon 7 in the 1972 Code is quite revealing. According to the Reporter of the Standing Committee which promulgated the 1972 Code, Canon 7 was a response to the Committee's belief "that the ethical standards of impartiality and the appearance of impartiality are basically incompatible with the practical political necessities involved in being elected to judicial office."[17] However, because the Committee "recognized that thousands of our judges are elected to office and that the system will not change overnight," Canon 7 was included "not only to set ethical minimums, but also to upgrade the campaigns for elective judicial offices."[18] In other words, the Committee did not approve of judicial elections, but recognized that they are deeply ingrained in state governmental systems. Thus, Canon 7 was the Committee's attempt to "upgrade" judicial elections by effectively gagging judicial candidates.

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10. *Id.* According to formal opinions issued by the ABA, Canon 30 prevented candidates for judicial office from answering specific legal questions over the radio, sending letters to a large number of people asking for their recommendation for reappointment, sending letters to members of the bar seeking their endorsement, and expressing opinions on legal problems that might come before the candidate as a judge. *See* AMERICAN BAR ASSOCIATION, OPINIONS ON PROFESSIONAL ETHICS 221-22 (1967).

11. *See* E. Wayne Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793 (1972). Mr. Thode served as Reporter for the committee in charge of reexamining the 1924 Canons, the ABA Special Committee on Judicial Standards. *See also* O'Hara, *supra* note 7, at 211.

12. *See* Thode, *supra* note 11, at 796.

13. CODE OF JUDICIAL CONDUCT, CANON 7A(1) (1972).

14. CODE OF JUDICIAL CONDUCT, CANON 7(B)(1)(c) (1972). The 1972 Code also prohibits incumbent judges from commenting publicly "about a pending or impending proceeding in any court." *Id.* Canon 3(A)(6). Although this provision likely does not suffer from the same flaws as Canon 7(B)(1), the propriety of Canon 3(A)(6) is beyond the scope of this article.

15. *See* Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224, 228 (7th Cir. 1993).

16. *See* J. David Rowe, *Note, A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 TEX. L. REV. 597, 599 n.29 (1995).

17. Thode, *supra* note 11, at 797.

18. Thode, *supra* note 11, at 797.

Following a comprehensive review of the 1972 Code, the ABA released the Model Code of Judicial Conduct in 1990.[19] Canon 7 of the 1972 Code was moved to Canon 5 in the 1990 Model Code, and the pledges and promises clause was left essentially unchanged.[20] However, the announce clause of the former Canon 7 was substantially modified by Canon 5, as the ABA was concerned that the announce clause was "'an overly broad restriction on speech.'"[21] Canon 5 of the Model Code prohibits candidates for judicial office from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[22] Unfortunately, this provision does not appear to be any less restrictive than the 1972 Code's "announce clause," as "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."[23]

Additionally, the Model Code extends these speech restrictions to candidates seeking judicial office by appointment, unlike the Canon 7 of the 1972 Code, which applied only to candidates for elected positions.[24] Many states have adopted speech restrictions based on Canon 5 of the Model Code.[25]

III. APPLICATION OF THE CANONS IN DISCIPLINARY PROCEEDINGS

There have been a significant number of cases in which disciplinary action has been taken against judicial candidates for violating these speech restrictions during election campaigns. One of the most egregious examples is *Deters v. Judicial Retirement and Removal Comm'n,*[26] in which a candidate for a trial court in Kentucky was found to have violated a provision based on Canon 5 of the 1990 Model Code by circulating campaign materials which stated that he was a "pro-life candidate."[27] In affirming the public censure of the candidate, the Kentucky Supreme Court stated that by announcing his pro-life position on abortion, the candidate appeared to have committed himself not only on "the abortion issue," but on other issues as well, as "the 'pro-life' movement is not limited to abortions but also deals with living wills and controversies involving removing tubes or respirators."[28]

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19. *See* MODEL CODE OF JUDICIAL CONDUCT (1990) (hereinafter "the Model Code").

20. *See id.* Canon 5(A)(3)(d)(i).

21. *See* J. David Rowe, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech,* 73 TEX. L. REV. 597, 601 (1995) (quoting MODEL CODE OF JUDICIAL CONDUCT as Submitted for Consideration at the 1990 Annual Meeting of the House of Delegates of the American Bar Association, reprinted in American Bar Association, Report of the Standing Committee on Ethics and Professional Responsibility Concerning the Proposed Model Code of Judicial Conduct, app. C at 72 (1990)).

22. *See* MODEL CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(ii) (1990). The Model Code also contains a provision, similar to the one found in Canon 3(A)(6) of the 1972 Code, prohibiting sitting judges from making public comments regarding any pending or impending proceeding which "might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." *Id.*, Canon 3(B)(9). As stated above with regard to Canon 3(A)(6) of the 1972 Code, the constitutionality of Canon 3(B)(9) is beyond the scope of this article.

23. *Buckley,* 997 F.2d at 229.

24. *See* MODEL CODE, Terminology, defining "candidate" as "a person seeking selection for or retention in judicial office by election or appointment."

25. *See* Rowe, *supra* note 16, at 601 n.35.

26. 873 S.W.2d 200 (Ky. 1994).

27. *Id.* at 203.

28. *Id.*

In *J.C.J.D. v. R.J.C.R.*[29] a justice on the Kentucky Supreme Court was suspended without pay for statements made during the election which were alleged to have violated Canon 7(B)(1). In particular, the candidate was found to have violated Canon 7(B)(1) by announcing his views regarding "the fireman's rule," laws regarding the carrying of handguns by felons, and the standard of review in workers' compensation cases, and for criticizing the Code of Judicial Conduct and the Kentucky Supreme Court.[30]

In *In re Kaiser*,[31] a judge was censured under Canon 7(B)(1) for, among other things, stating that he would be tough on drunk drivers.[32] In *Beshear v. Butt*,[33] a judicial candidate was alleged to have violated Canon 7(B)(1) for stating that he would not allow plea bargaining.[34] In *Buckley v. Illinois Judicial Inquiry Board*,[35] a justice on the Appellate Court of Illinois was found to have violated a provision modeled after Canon 7(B)(1)(c) by circulating campaign literature which said that he had "never written an opinion reversing a rape conviction."[36]

Numerous ethics advisory opinions have also been issued by various bar associations regarding impermissible campaign speech by candidates for judicial office.[37] For example, opinions have been issued construing the canons to prohibit candidates from stating their personal views on the legalization of marijuana, the death penalty, and abortion.[38] Other topics deemed beyond the scope of permissible discussion include pre-trial release, plea bargaining, criminal sentencing, gun control, the equal rights amendment, gambling laws, liquor licensing, dram shop legislation, labor laws, property tax exemptions, the regulation of condominiums, court rules, prior court decisions, and any specific or hypothetical legal questions.[39] In short, candidates for judicial office are subject to being disciplined for speaking about almost any issue, legal or political, during a campaign for office.

IV. COURT DECISIONS REGARDING THE CONSTITUTIONALITY OF THE CANONS

A. Decisions Holding that the Canons Violate the First Amendment

Because of the obvious oppressiveness of these speech restrictions, numerous courts have concluded that they violate the Free Speech Clause of the First Amendment. The leading case holding that Canon 7 is unconstitutional is *Buckley v. Illinois Judicial Inquiry Board*.[40] The plaintiff in Buckley, a judge on

29. 803 S.W.2d 953 (Ky. 1991).

30. *See id.* at 954. The Kentucky Supreme Court ultimately vacated the decision of the disciplinary commission, holding that Canon 7 violates the First Amendment rights of candidates for judicial office. *See id.*

31. 759 P.2d 392 (Wash. 1988).

32. *Id.* at 400.

33. 863 F. Supp. 913 (E.D. Ark. 1994).

34. *Id.* at 915. The *Beshear* court held that Canon 7(B)(1)(c) and a similar provision "are substantially overbroad and vague" and therefore violate the First Amendment. *Id.* at 917.

35. 997 F.2d 224 (7th Cir. 1993).

36. *Id.* at 226. The Seventh Circuit also held that the provision violates the First Amendment. *See id.* at 230-31.

37. *See* SHAMAN, *supra* note 7, § 11.09, at 372-377.

38. *See id.* at 372-373.

39. *See* PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86-87 (American Judicature Society) (1990).

40. 997 F.2d 224 (7th Cir. 1993).

an intermediate appellate court in Illinois, unsuccessfully ran for a seat on the Illinois Supreme Court.[41] During the campaign, Justice Buckley circulated a brochure "which stated that he 'had never written an opinion reversing a rape conviction.'" [42] The Illinois Courts Commission found that the brochure violated Illinois' version of Canon 7, Illinois Supreme Court Rule 67(B)(1)(c).[43]

Justice Buckley filed suit challenging Rule 67(B)(1)(c) on First Amendment grounds, and his suit was consolidated with the suit of a state circuit judge who claimed that Rule 67(B)(1)(c) deterred him during his campaign from speaking "on issues that he believed to be important to Illinois voters, including capital punishment, abortion, the state's budget, and public school education."[44] The district court upheld the rule, construing it to prohibit only "statements on issues likely to come before the judge in a case."[45]

The United States Court of Appeals for the Seventh Circuit reversed, holding that Rule 67(B)(1)(c) was an overbroad speech restriction in violation of the First Amendment. The court of appeals first noted that the case involved two competing principles which must be reconciled. First, candidates for public office must be free to express their views on matters of interest to the public.[46] Second, judicial decisions ought to be based on the law, rather than on "any express or implied commitments" a judicial candidate made during an election.[47] However, the court continued:

> Only a fanatic would suppose that one of the principles should give way completely to the other—that the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases or that the principle of impartial legal justice should be held to prevent a candidate for such office from furnishing any information or opinion to the electorate beyond his name, rank, and serial number.[48]

Moreover, in reconciling these principles, the court said, it is appropriate to consider that judges are different from candidates for executive or legislative office "in ways that bear on the strength of the state's interest in restricting their freedom of speech."[49]

The court then concluded that Rule 67(B)(1)(c) was an overbroad restriction of the campaign speech of judicial candidates. As for the pledges and promises clause, the court noted the sweeping nature of the prohibition: "all pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office."[50] Thus, a candidate could not "pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers."[51]

41. *See id.* at 225.
42. *Id.* at 226.
43. *See id.* at 226.
44. *Id.*
45. *Id.*
46. *See id.* at 227.
47. *See id.*
48. *Id.*
49. *Id.*.
50. *Id.* at 228.
51. *Id.*

As for the "announce clause," the court noted that it "is not limited to declarations as to how the candidate intends to rule in particular cases or classes of cases; he may not 'announce his views on disputed legal or political issues,' period."[52] Thus, a judicial candidate

> cannot criticize *Roe v. Wade.* He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform.[53]

In short, Rule 67(B)(1)(c) prohibited far more speech than necessary to prevent candidates from making commitments that would compromise their impartiality if elected to the bench. Indeed, "the only safe response to Illinois Supreme Court Rule 67(B)(1)(c)," the court said, "is silence."[54]

The Seventh Circuit rejected the district court's attempt to narrowly construe the announce clause to prohibit only statements regarding "issues likely to come before the judge in his judicial capacity."[55] Such an interpretation would not circumscribe the rule significantly, as

> [t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction. The civil war in Yugoslavia? But we have cases in which Yugoslavs resist deportation to that nation on the ground that they face persecution from one or another side in that nation's multisided civil war; and some years ago the Illinois courts were embroiled in a custody fight involving a child who didn't want to return to the then Soviet Union with his Soviet parents.[56]

Moreover, the court continued, a narrow construction of the "announce clause" "does not touch the 'pledges and promises' clause, which is as overbroad as the 'announce' clause."[57]

The court also rejected the argument that the rule could be upheld because some of the statements prohibited by the rule are within the state's regulatory power. "A statute that forbids, or can fairly be read to forbid, privileged speech," the court stated, "is not saved by the fact that it also forbids unprivileged speech and could in application be confined to the latter."[58]

The Kentucky Supreme Court reached the same conclusion in *J.C.J.D. v. R.J.C.R.*[59] In that case, a justice on the Kentucky Supreme Court was sanctioned under Kentucky's version of Canon 7(B)(1) by the judicial disciplinary commis-

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* The district court's interpretation of Rule 67(B)(1)(c) is not materially different from the revised restriction in Canon 5, which prohibits judicial candidates from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *See* MODEL CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(ii) (1990).
56. *Buckley,* 997 F.2d at 229.
57. *Id.*
58. *Id.* at 230 (citing Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 964-68 (1984), and Smith v. Goguen, 415 U.S. 566 (1974)).
59. 803 S.W.2d 953 (Ky. 1991).

sion for, among other things, announcing during a campaign his views regarding "the fireman's rule," laws regarding the carrying of handguns by felons, and the standard of review in workers' compensation cases, and for criticizing the Code of Judicial Conduct and the Kentucky Supreme Court.[60] The Kentucky Supreme Court vacated the commission's decision, holding that Canon 7(B)(1) unconstitutionally prohibits speech protected by the federal and state constitutions.

The court first stated that judicial candidates, no less than other candidates, have "'a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly advocate [their] own election.'"[61] This right is not absolute, however, and state regulation of protected speech is permissible if the regulation is "necessary to serve a compelling state interest," and if the regulation "has been narrowly written to protect against the evil that the government can control."[62] "Moreover," the court continued, "restrictions affecting free speech that can result in disciplinary action to the speaker are subject to even stricter scrutiny.[63] Such restrictions are permissible only if they are "so narrowly drafted, and strictly applied, that the compelling state interest is served without unnecessarily burdening the exercise of free speech."[64]

Applying this standard, the court found that the state had a compelling interest in preserving and protecting the integrity and objectivity of the judicial system.[65] However, the court concluded that Canon 7(B)(1) is not narrowly tailored to further that interest because

> [o]ther than allowing a judicial candidate to state a professional history, and promise faithful and impartial performance of duties if elected, the existing Canon strictly prohibits dialogue on virtually every issue that would be of interest to the voting public. Inasmuch as the purpose of an election is to give the electorate the opportunity to become informed on a judicial candidate's qualifications for the position, which would include, among other things, knowledge of the law, and personal views and beliefs, the Canon fails in this respect. Instead, we are encouraging the public to judge candidates for our judiciary by not much more than their personal appearances.[66]

The court rejected the argument that prohibiting candidates from announcing their views on disputed legal or political issues is necessary for preserving the impartiality, integrity and independence of the legal system.[67] Nor did the court agree that prohibiting the discussion of disputed legal or political issues "is necessary to prevent campaign statements which may indicate a predisposition or bias in favor of one litigant over another."[68]

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60. *See id.* at 954.
61. *Id.* at 954-55 (quoting Buckley v. Valeo, 424 U.S. 1 (1976)).
62. *Id.* at 955.
63. *Id.* (citing In re Primus, 436 U.S. 412 (1978)).
64. *Id.*
65. *See id.*
66. *Id.*
67. *See id.* at 956.
68. *Id.*

Similarly, in *Beshear v. Butt*,[69] judicial candidates were alleged to have violated Canon 7(B)(1), as adopted by the State of Arkansas, by stating that they did not approve of plea bargaining.[70] The candidates filed suit challenging the constitutionality of the provision, and the district court granted summary judgment in their favor, holding that the restrictions violate the First Amendment.

The court found that Canon 7(B)(1) impermissibly prohibited "a significant amount of constitutionally protected conduct by inhibiting free expression as well as imposing a chilling effect on a judicial candidate's efforts and desire to express his views to the public relative to the problems confronting the judiciary and how the candidate proposes to deal with them."[71] Thus, the court concluded that the restrictions were "substantially overbroad and vague."[72] In fact, the court said, the restrictions "minimize the importance of free speech and openness in the very branch of government that serves as guardian of the civil liberties of the people."[73]

In *ACLU v. The Florida Bar*,[74] a candidate for judicial office challenged the constitutionality of Canon 7(B)(1), as adopted by Florida, as an impermissibly overbroad and vague restriction of protected speech. Specifically, the candidate claimed that he intended to criticize the incumbent judge, and that such criticism would necessarily involve the prohibited discussion of "disputed legal or political issues."[75] The court concluded that Canon 7(B)(1) violates the First Amendment. The court first noted that a regulation such as Canon 7(B)(1), which restricts speech on the basis of its content, is presumptively unconstitutional, and may be upheld only if the state demonstrates that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[76] The court also noted, however, that the state may permissibly treat judicial candidates differently from other candidates for elective office, "if for no other reason, because the judicial office is different in key respects from other offices."[77] Moreover, candidates for judicial office are lawyers, and "obedience to the profession's ethical precepts may require abstention from what in other circumstances would be constitutionally protected behavior."[78]

However, the court continued, "a person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office."[79] Moreover, "when a state decides that its trial judges are to be popularly elected, as Florida has done, it must recognize the candidates' right to make campaign speeches and the concomitant right of the public to be informed about the judicial candidates."[80]

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69. 863 F. Supp. 913 (E.D. Ark. 1994).
70. *Id.* at 915.
71. *Id.* at 918.
72. *Id.*
73. *Id.*
74. 744 F. Supp. 1094 (N.D. Fla. 1990).
75. *See id.* at 1096.
76. *Id.* at 1097 (citing Widmar v. Vincent, 454 U.S. 263 (1981)).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

Applying these principles, the court easily concluded that Florida had a compelling interest in protecting the integrity of its judiciary.[81] However, the court held that it could not "agree that a prohibition of all discussion of disputed legal and political issues is the most narrowly drawn means of protecting that interest."[82] Canon 7(B)(1), the court said,

> does more than proscribe untruthful or deceptive announcements, or announcements concerning specific cases, or announcements which might be construed as particularized pledges of conduct, or announcements limited in some other relevant manner. Except for information about the candidates' background, it effectively proscribes announcements on almost every issue that might be of interest to the public and the candidates in a judicial race.[83]

In other words, the State of Florida, "while entrusting its citizenry with the responsibility of electing its trial judges, has severely limited the information to be used by those citizens in discharging that responsibility."[84] In doing so, the court concluded, "the state underestimates the ability of the public to place the information in its proper perspective."[85]

The court also rejected the contention that judicial candidates' views on disputed legal or political issues are irrelevant:

> As to relevance, the court is acutely aware that judges routinely exercise their discretion within the confines of the facts and the law. How judges choose to exercise that discretion is a matter of much concern to litigants, lawyers, and the public alike. That concern makes a judicial candidates' views on disputed legal or political issues anything but irrelevant.[86]

In short, the court concluded that the state had failed to carry its burden of showing "that Canon 7(B)(1)(c) is the least restrictive means for protecting a compelling state interest."[87]

In *In re Chmura,*[88] judicial candidate and incumbent judge, John Chmura, allegedly violated Canon 7(B)(1)(d) by distributing various campaign fliers criticizing Detroit Mayor Coleman Young and another member of the judiciary.[89] The flier also described how Chmura was "One Tough Judge" and mentioned accomplishments Chmura made while on the bench.[90] As a result of these fliers, the Judicial Tenure Commission of Michigan "filed a complaint alleging that [Chmura's] campaign literature violated Canon 7(B)(1)(d) of the Code of Judicial Conduct."[91] After a preliminary ruling by a circuit judge that the Canon

81. *See id.* at 1098.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1099.
86. *Id.*
87. *Id.*
88. 608 N.W.2d 31(Mich. 2000).
89. *Id.* at 33-34.
90. *Id.* at 34.
91. *Id.* at 35.

is overbroad and therefore unconstitutional, the Judicial Tenure Commission held a hearing and concluded that Canon 7(B)(1)(d) is not overbroad.[92] Chmura appealed the ruling of the Judicial Tenure Commission to the Supreme Court of Michigan.

The Supreme Court of Michigan held that Canon 7(B)(1)(d) "unnecessarily circumscribe[d] protected expression"[93] and "greatly chills debate regarding the qualifications of candidates for judicial office."[94] Furthermore, the Court found that Canon 7 (B)(1)(d) was overbroad in that "it applies to all statements that bear on the impartiality of the judiciary ... to avoid the risk of discipline, a judicial candidate will merely state academic credentials, professional experience, and endorsements received."[95] Applying strict scrutiny, the Court found that while the State does have a compelling interested in setting limitations on speech during judicial elections, Canon 7(B)(1)(d) is not narrowly tailored to meet that interest.[96] As a result, the Court "narrow[ed] the canon to prohibit a candidate from either knowingly or recklessly using forms of public communication that are false."[97]

B. Cases Upholding the Canons under the First Amendment

A few courts have upheld speech restrictions on judicial candidates. The leading case upholding Canon 7(B)(1) in the face of a First Amendment challenge is *Stretton v. Disciplinary Board.*[98] In *Stretton,* a candidate for judicial office filed suit alleging that his ability to campaign was impeded by Canon 7(B)(1), as adopted by Pennsylvania. In particular, the plaintiff claimed that he wished to "announce" his views on the following issues, and that Canon 7(B)(1) prohibited him from doing so:

> (a) the need for the election of judges with an "activist" view;
>
> (b) criminal sentencing and the rights of victims of crime;
>
> (c) "reasonable doubt" and how he would apply that standard as an elected judge;
>
> (d) the need to more closely scrutinize the work of district judges (formerly known as justices of the peace);
>
> (e) the need for various changes in judicial administration, including insuring that juries more accurately reflect the racial composition of the county;
>
> (f) the need for greater sensitivity toward hiring minority lawyers and law clerks, especially by the county judges and district attorney;
>
> (g) plaintiff's qualifications and those of his opponents, as well as a perceived need for a woman judge; and

92. *Id.*
93. *Id.* at 42.
94. *Id.*
95. *Id.*
96. *Id.* at 43.
97. *Id.* at 33.
98. 944 F.2d 137 (3d Cir. 1991).

(h) the importance of the right to privacy as a basic constitutional right.[99]

The district court concluded that the state had a compelling interest in preserving the integrity of the electoral process, but found that Canon 7(B)(1) was "drastically overbroad."[100] "Just as a state may not prohibit a candidate from making any promises to voters," the district court said, "it may not prohibit judicial candidates from announcing any of their views at any time in any setting on disputed legal or political issues."[101]

The Third Circuit reversed, holding that Canon 7(B)(1) does not impermissibly burden the First Amendment rights of judicial candidates. The court stated that in order for a restriction on campaign speech to pass muster under the First Amendment, the restriction must be supported by a compelling interest, and that interest must be furthered without unnecessarily circumscribing protected speech.[102]

Applying this standard, the court found that the state had a compelling interest "in the integrity of its judiciary."[103] Moreover, the court continued,

> [i]t requires no extended discussion to demonstrate that Pennsylvania's canon serves this interest. If judicial candidates during a campaign prejudice cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to all the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.[104]

The judicial branch of government, the court said, differs from the legislative and executive in that the public does not need "to know the details of the programs that candidates propose to enact into law and administer."[105] Pledges of conduct in the legislative and executive branches "are not only expected," the court said, "but are desirable so that voters may make a choice between proposed agendas that affect the public."[106] The judicial system, by contrast, "is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government."[107]

Therefore, the court concluded that Pennsylvania had demonstrated that the canon served a compelling government interest. "The fact that a state chooses to select its judges by popular election," the court said, "while perhaps of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly."[108]

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99. *Id.* at 139. The plaintiff also desired to send a form letter soliciting funds for his campaign, and claimed that Canon 7(B)(2), which prohibits such solicitation, infringed upon his First Amendment rights *See id.* at 139, 145. The district court and the court of appeals upheld this prohibition. *See id.* at 145-46. The constitutionality of Canon 7(B)(2) is beyond the scope of this Article.

100. *Id.* at 140.

101. *Id.*

102. *See id.* at 141-41.

103. *Id.* at 142.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

The court also found that the canon was narrowly tailored to serve the state's compelling interest. In order to reach this conclusion, the court construed the "announce clause" narrowly as referring only to those disputed legal or political issues "that are likely to come before the court."[109] "Read in this way," the court said, "the restriction is narrowly tailored to serve the state's compelling interest in an impartial judiciary."[110]

In *Deters v. Judicial Retirement & Removal Comm'n*,[111] a judicial candidate was disciplined under Kentucky's version of Canon 5 of the Model Code for running as a "pro-life candidate." The Judicial Retirement and Removal Commission found that the candidate's "claim of being a 'pro-life candidate' appeared to commit him to a position not only on abortion matters, but also on other controversies," such as living wills and the removal of life support.[112] The Kentucky Supreme Court rejected his First Amendment challenge to the canon, holding that the provision was "'sufficiently and closely drawn so as to avoid unnecessary abridgment of a judicial candidate's right of free speech during the campaign.'"[113] "[T]here is a compelling state interest in so limiting a judicial candidate's speech," the court said, "because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system."[114]

Dissenting in *Deters*, Justice Wintersheimer, joined by Justice Lambert, argued that candidates for judicial office "should be free to express their views on all matters of interest to the voters."[115] "An informed electorate is the foundation of true liberty," Justice Wintersheimer wrote.[116] "The judiciary is no exception and is subject only to limitations which must be carefully and narrowly drawn."[117] Justice Wintersheimer rejected the argument that the restrictions were necessary to protect the integrity and impartiality of the judiciary. Instead, "[r]ecusal is a full guarantee for any appearance of impropriety."[118] Moreover, Justice Wintersheimer continued, "[t]he best antidote for the misbehaving candidate is the voice of a truly informed electorate."[119]

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109. *Id.* at 144.

110. *Id.* The court also upheld Canon 7's prohibition of the personal solicitation of campaign funds by candidates for judicial office. *Id.* at 144-46. However, the court's discussion of that issue is beyond the scope of this Article.

111. 873 S.W.2d 200 (Ky. 1994).

112. *See id.* at 203.

113. *Id.* at 204 (quoting *Ackerson v. Kentucky Judicial Retirement & Removal Comm'n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991)). In *Ackerson*, the court held that Kentucky's version of Canon 5 of the Model Code did not violate the First Amendment rights of judicial candidates, except insofar as the provision would prohibit statements regarding administrative matters such as an alleged backlog of cases. *See id.* at 314. With respect to all other issues, the court held "that there is a compelling state interest in so limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system. The canon is closely tailored to this end." *Id.* at 315.

114. *See Deters*, 873 S.W.2d at 205.

115. *Id.* at 206 (Wintersheimer, J., dissenting).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

In *In re Kaiser,*[120] a Washington state trial judge seeking reelection was disciplined under Canon 7 of the 1972 Code for, among other things, identifying his family as "lifelong Democrats," promising to be "tough on drunk driving," impugning the motives of criminal defense attorneys who donated to his opponent's campaign, and misrepresenting the source of his opponent's campaign funds.[121] Citing *In re Donohue,*[122] the Washington Supreme Court held that the judge's comments regarding the source of his opponent's campaign funds were protected by the First Amendment because there was no "unequivocal evidence" that the judge knew the statements were false.[123]

However, the court determined that the judge's statements regarding party affiliation, the motives of contributors to his opponent's campaign, and promises to be tough on drunk driving were not protected by the First Amendment. The court held that judicial candidates may, consistent with the First Amendment, be prohibited from announcing their views on issues likely to come before the court, or making pledges or promises regarding those issues. "[T]he only legitimate area for debate," the court said, "'is the relative qualifications of the candidates. In our view, the health, work habits, experience and ability of the candidates are all matters of legitimate concern to the electorate who must make their choice.'"[124] Because the statements at issue did not, in the court's view, pertain to the "relative qualifications" of the candidates, the statements were not protected by the First Amendment.[125]

Similarly, in *Summe v. Judicial Retirement & Removal Commission,*[126] the court sanctioned a judicial candidate for campaign materials that appeared to be a newspaper and for a letter written by a citizen in support of the candidate that was sent to citizens of Kenton County criticizing Summe's opponent's record on prosecuting child abusers. The court also upheld Canon 7(B)(1)(c) as constitutional. The court in *Summe* rejected the rulings in *J.C.J.D. v. R.J.C.R.*[127] and *Buckley v. Judicial Inquiry Board*[128] as not persuasive, and instead, adhered to the rulings in *Ackerson v. Kentucky Judicial Ret. & Removal Comm'n*[129] and *Deters*

120. 759 P.2d 392 (Wash. 1988).

121. *See id.* at 394-95.

122. 580 P.2d 1093 (1978) (holding that First Amendment does not protect utterances made by licensed attorney with knowledge of its falsity).

123. *See In re Kaiser*, 759 P.2d at 398.

124. *Id.* at 400 (quoting *In re Baker,* 542 P.2d 701 (Kan. 1975)).

125. *See id.* The Washington Supreme Court's holding in *In re Kaiser* was recently called into doubt by *In re Sanders,* 955 P.2d 369 (Wash. 1998) (en banc). In that case, a newly-elected justice on the Washington Supreme Court appeared and spoke at a pro-life rally immediately following his swearing-in ceremony. *See id.* at 179. The Washington Commission on Judicial Conduct concluded that the justice had violated several provisions of Washington's Code of Judicial Conduct, including the prohibition, based on Canon 5(D) of the Model Code, of engaging in political activity except that authorized by the code or "'on behalf of measures to improve the law, the legal system or the administration of justice'" *Id.* at 184 (quoting Wash. Code of Judicial Conduct, Canon 7(A)(5)). In holding that the justice's conduct was protected by the First Amendment, the Washington Supreme Court cited the Seventh Circuit's decision in *Buckley* as "compelling." *Id.* at 186. "We see no reason why the same principles should not apply to speech by a sitting judge, albeit with somewhat less force," the court said. *See id.* at 188. It is reasonable to assume that in a proper case the court would apply the same analysis to the speech of judicial candidates.

126. 947 S.W.2d 42 (Ky. 1997).

127. 803 S.W.2d 953 (1991).

128. 997 F.2d 224 (7th Cir. 1993).

129. 776 F.Supp. 309 (W.D.Ky. 1991).

v. Judicial Ret. & Removal Comm'n,[130] which upheld the Canons under the First Amendment. In upholding the Canons under the First Amendment, the *Summe* court quoted the ruling in *Ackerson* by saying:

> This interest [in maintaining the impartiality of the legal process] is simply too great to allow judicial campaigns to degenerate into a contest of which candidate can make more commitments to the electorate on legal issues likely to come before him or her. We therefore find that the canon is sufficiently and closely drawn so as to avoid unnecessary abridgment of a judicial candidate's right of free speech during the campaign. We also find the cannon is neither vague nor overbroad.[131]

In *Republican Party of Minnesota v. Kelly,*[132] a candidate for the Minnesota Supreme Court filed suit challenging various provisions of Minnesota's Code of Judicial Conduct, including Minnesota's version of the "announce clause."[133] The candidate alleged that Canon 7(B)(1) violated his First Amendment rights by prohibiting him from announcing that he was a "strict constructionist of the Constitution," and from criticizing certain decisions of the Minnesota Supreme Court.[134]

In ruling on the candidate's motion for a preliminary injunction, the district court determined that the candidate had demonstrated a likelihood of success on the merits of his constitutional challenge to Canon 7(B)(1), stating that "[t]he Court has reviewed the law cited by the parties in their briefs, and at this time, finds that those cases holding the 'announce' rule unconstitutionally overbroad are more persuasive."[135] The court declined to grant the preliminary injunction, however, finding that the balance of hardships, including the lack of backup rules, weighed in favor of maintaining the status quo until the issues were fully litigated.[136]

At trial, the District Court acknowledged that in ruling on Plaintiffs' motions for a preliminary injunction, it initially ruled that Plaintiffs had shown a likelihood of success on the merits of its claim that the "announce clause" was unconstitutional as written. However, upon closer examination of the applicable case law, the Court was convinced that the "announce clause" was constitutional when narrowly construed.[137]

According to the Court, when determining a facial challenge to a statute, the Court must uphold it if the statute's language is readily susceptible to a narrowing construction that would make it constitutional. The Court found that the Minnesota Supreme Court would interpret the "announce clause" narrowly, consistent with the construction urged by the Judicial Board. The Court held that by

130. 873 S.W.2d 200 (1994).
131. 947 S.W.2d 42, 47 (Ky. 1997).
132. 996 F. Supp. 875 (D. Minn. 1998).
133. The candidate also challenged various provisions prohibiting partisan political activity on the part of judges and candidates for judicial office. The constitutionality of those provisions is beyond the scope of this Article.
134. *See id.* at 876.
135. *Id.* at 879.
136. *See id.*
137. Republican Party of Minnesota v. Kelly, 63 F. Supp. 2d 967, 985 (D. Minn. 1999), *aff'd,* 247 F.3d 854 (8th Cir. 2001).

interpreting the "announce clause" as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court, the "announce clause" serves the state's compelling interest in maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech.[138]

On appeal, the United States Court of Appeals for the Eighth Circuit concluded that the "announce clause," as construed by the district court, was narrowly tailored to further compelling governmental interests. As construed by the district court, the restriction prohibits candidates only from publicly making known how they would decide issues likely to come before them as judges. The court of appeals said that these sorts of campaign announcements are (or can appear to be) calculated to show that the candidate will decide cases in a certain way if elected into office, and the implication that the candidate will carry through with his campaign announcements can haunt the candidate on the bench to the detriment of the State's judicial system.[139]

The Eighth Circuit held that under this narrow construction, nothing in the canon restricts candidates from discussing or publicizing information about their character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits, and abilities, which the court believed were subjects the Minnesota General Assembly has determined to be highly relevant to a candidate's qualification for office.[140] Additionally, the court of appeals concluded that the Minnesota Supreme Court would conclude that general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the provision. The court also accepted the Judicial Board's opinion that the canon does not prohibit candidates from discussing appellate decisions. The court further noted that the Judicial Board had approved sample questions for interested voters to ask candidates. The Court found that the questions were wide-ranging and included such topics as a candidate's judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system.[141]

In dissent, Judge Beam argued that the provision ran roughshod over the clearly established speech and associational rights of candidates, political parties and the voting public, and effectively banned campaigning itself. According to Judge Beam, the "announce clause" barred discussion of all disputed legal and political issues, and the court's narrowing construction to "issues likely to come before the candidate," was meaningless. Judge Beam argued that, although the court suggested that a candidate may discuss his "judicial philosophy," he could not fathom "disputed legal issues" more likely to come before a court than the proper role of stare decisis, narrow or strict construction, original intent and substantive due process, which he considered to be encompassed by the term "judicial philosophy." According to Judge Beam, the term was as sweeping as the court's

138. *Id.* at 985-86.
139. Republican Party of Minnesota v. Kelly, 247 F.3d 854, 881-83 (8th Cir. 2001).
140. *Id.* at 882.
141. *Id.*

allegedly narrow construction.[142] The Supreme Court granted certiorari in the case on December 3, 2001.[143]

V. THE CONSTITUTIONALITY OF THE CANONS

The Supreme Court has long recognized that the freedom of speech protected by the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."[144] In *Buckley v. Valeo,* the Court explained the importance of this core political speech:

> Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.[145]

A candidate for judicial election thus has a paramount First Amendment right to engage in campaign activities advocating his or her election to public office, including the right to engage in the discussion of legal and political issues.[146]

As such, speech related to campaigns for public office constitutes "core political speech,"[147] and any governmental restriction on such speech must satisfy the most "exacting scrutiny," and will be upheld only if the restriction is narrowly tailored to serve a compelling governmental interest.[148] That is, a reviewing court must strictly scrutinize the regulation and may uphold it only if the restriction is necessary to serve a compelling governmental interest and is narrowly tailored to serve that interest.[149]

Courts reviewing the canons typically qualify this analysis with the assertion that "judges are different." For example, in *Kelly* the court of appeals stated that "[t]here are important differences between judicial office, on the one hand, and legislative or executive office, on the other, that affect the nature of the candidate's interest in certain kinds of policy debate."[150] True enough. As the Seventh Circuit stated in *Buckley,* "Judges remain different from legislators and executive officials, even when all are elected."[151] However, those differences only "bear on the strength of the state's interest in restricting their freedom of speech."[152] Any such restrictions must still be necessary to serve a compelling governmental

142. *Id.* at 892-94.
143. *See* 70 U.S.L.W. 3372 (U.S. Dec. 3, 2001) (No. 01-521).
144. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).
145. Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (internal quotation marks and citations omitted).
146. *Id.* at 52.
147. *Id.*
148. *McIntyre,* 514 U.S. at 347.
149. Widmar v. Vincent, 454 U.S. 263 (1981).
150. *Kelly,* 247 F.3d at 862.
151. *Buckley,* 997 F.2d at 228.
152. *Id.*

interest and be narrowly tailored to serve that interest. As Judge Beam stated in *Kelly*, "[a]s a matter of constitutional law, . . . the judiciary has no more or less right to than any other coordinate branch to insulate itself from the rigors of public debate, particularly in the election context."[153]

A. Are the Canons Necessary to Achieve A Compelling Governmental Interest?

Courts upholding the canons have uniformly asserted that the canons are justified by the government's compelling interest in preserving the actual or perceived "integrity," "independence," and "impartiality" of the judiciary. The interest has been stated with slight variations, such as preserving the "integrity of [the] judiciary,"[154] "guarantee[ing] the independence of the . . . judiciary, which in turn is crucial to preserv[ing] the justice of its courts and its citizens' faith in those courts"[155] preventing the "confidence of the public in the rule law" from being "undermined,"[156] ensuring access to "an impartial judiciary carrying out its duties fairly and thoroughly,"[157] and preserving the "fundamental fairness and impartiality of the legal system."[158]

1. Integrity, Fairness and Impartiality

Few would dispute that preserving the actual and perceived integrity, fairness, and impartiality of the judiciary are compelling governmental interests, and as a result reviewing courts have typically glided over this portion of the strict scrutiny analysis and moved on to determine whether the restrictions are narrowly tailored to serve those interests. What the courts have failed to adequately explain, however, is precisely *how* the canons serve these interests.[159] That is, in determining whether a speech restriction is necessary, efficacy is the touchstone of effectiveness.[160] A regulation that is not effective in achieving the ends sought is obviously not necessary.

With respect to the goal of preserving the actual "integrity," "impartiality," or "fairness" of the judiciary, presumably this means that the canons ensure that judges have not "prejudged" cases that may come before the court, and will neutrally and impartially decide the cases that come before the court. That is, the integrity, impartiality, and fairness of the judiciary are said to be preserved by prohibiting a judge or candidate for judicial office from "mak[ing] "pledges or promises of conduct in office, other than the faithful and impartial performance of the duties of office," "announc[ing] his views on disputed legal or political issues," or "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

153. *Kelly*, 247 F.3d at 897 (Beam, J., dissenting).
154. *Stretton*, 944 F.2d at 142.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Deters*, 873 S.W.2d at 205; *see also Summe*, 947 S.W.2d at 47.
159. In *Kelly*, the court of appeals cleared this hurdle by simply assuming its conclusion: the "announce clause," the court said, is necessary because it "restrains candidates from making statements in their campaigns about their views on disputed legal and political issues, and thus prevents candidates from implying how they would decide *cases* that might come before them as a judge." 247 F.3d at 877 (emphasis added). The question at issue, of course, is the extent to which statements about disputed political and legal issues indicate how a judge would rule in a particular case.
160. *Eu*, 489 U.S. at 228-29.

The focus of the canons, then, is on what the judges say, not, apparently, on what they *think*. It is presumably appropriate for a judge (within the bounds of the applicable recusal provisions) to actually hold some personal expectations regarding his or her conduct in office (for example, that he or she will interpret the Constitution as a "living document" or be a "strict constructionist"), or to have opinions on disputed legal or political issues, or issues likely to come before the judge in court (for example, that sex discrimination is prohibited by the Equal Protection Clause, or abortion is a constitutionally-protected right), so long as he or she does not give voice to those opinions. Surely no one would suggest that a judge who has an opinion on such matters is disqualified from hearing a case involving the issues and should recuse himself. Should Justice Ginsberg recuse herself in cases involving sex discrimination? Justice Scalia in cases of religious freedom? Justice Breyer in cases involving administrative law? These justices' opinions on these issues are widely known, and it would be absurd to suggest that they are unfit to hear such cases.

It is hard to imagine that anyone would take seriously the notion that individuals who are qualified to hold judicial office – intelligent, well-educated, successful and thoughtful people – would not have opinions on a wide range of issues. Indeed, one wonders whether an individual who has not thought enough to have formed opinions on disputed legal or political issues would be suitable for the bench. The question is whether the individual is willing to put his or her opinions aside and apply the governing law neutrally and fairly in the cases that come before the court. And the answer to that question clearly cannot be found by gagging the candidates and relegating the public discourse to matters of biography, education, professional history, and other similar information. As explained by one commentator, prohibiting candidates for judicial office from speaking publicly about their expected conduct in office or disputed legal and political issues does not remove any prejudices the candidates might have, but simply "hide[s] their prejudices behind a facade of forced silence."[161]

In fact, it would appear that the goal of preserving the integrity, impartiality, and fairness of the judiciary is not only not furthered by the canons, but is actually undermined by them. By prohibiting a judge or candidate from discussing his or her views regarding his or her planned conduct in office, or views on disputed legal or political issues, voters are forced to choose between candidates without being fully informed of the candidates' beliefs and anticipated conduct. As a result, voters who might otherwise be informed by candidates' campaign statements – a promise to protect or undermine a woman's right to abortion, to be tough or lenient on violent criminals, or to strictly or loosely interpret the constitution, or an announcement that the candidate does or does not believe in an individual right to bear arms, or the death penalty – are left to choose judges on the basis of little more than biographical information. Inappropriate public statements which might reveal to voters that a judge or candidate is incapable of rendering fair and impartial justice have been suppressed. As Justice Wintersheimer

161. Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 235 (1987).

of the Kentucky Supreme Court stated, "[t]he best antidote for the misbehaving candidate is the voice of a truly informed electorate."[162]

The interest in preserving the appearance of impropriety suffers from a similar flaw. If judges are permitted to make pledges or promises of conduct in office, or to state their views on disputed legal or political issues, the argument goes, the public's confidence in the impartiality and fairness of the judiciary will be compromised. The canons solve this problem by prohibiting the judges from making any such statements. As a result, the voters are given the impression – long since discredited in the legal profession – that judges are mere legal technicians, blindly and mechanically applying legal rules with no discretion or independent judgment. This, of course, is a myth, as judges "routinely exercise their discretion within the confines of the facts and law. How judges choose to exercise that discretion is a matter of much concern to litigants, lawyers, and the public alike. That concern makes a judicial candidate's views on disputed legal and political issues anything but irrelevant."[163] Indeed, the primary function of state supreme courts is to develop or "make" the common law of the state on a wide variety of subjects, including tort, contract, and property law. Under the canons, judges are chosen without voters having been informed of the judges' views, and many candidates who might appropriately have been rejected are chosen to fill judicial office. In the name of preserving the *appearance* of an impartial and fair judiciary, the goal of an *actually* impartial and fair judiciary is undermined.

2. The Independence of the Judiciary

The wisdom and relative advantages of an independent judiciary are well known, and will not be rehearsed here. After debating the merits of the various judicial selection systems, including appointment, retention, and election, the Framers of the Federal Constitution created a judiciary that is, *in fact,* independent of the other branches of government and the electorate, with judges appointed to office for life (subject to good behavior), and compensation that cannot be diminished.[164] As stated by one early commentator on American law, "[t]he tenure of office, by rendering the judges independent, both of the government and the people, is admirably fitted to produce the free exercise of judgment in the discharge of their trust."[165]

The wisdom of an appointive system was far from unanimously accepted by the Framers, however, and in fact was vigorously opposed by the Anti-Federalists, Brutus counseling that such a system was "'altogether unprecedented in a free country," being "'totally independent, both of the people and the legislature.'"[166] Alexander Hamilton refuted this position, however, stating that:

162. *Deters,* 873 S.W.2d at 206 (Wintersheimer, J., dissenting).

163. American Civil Liberties Union v. Florida Bar, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990).

164. U.S. CONST. art. III § 1.

165. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 36 (reprint of 1826-1830 ed., New York: Da Capo Press) (1971). *See also 2* KENT'S COMMENTARIES at 276 ("The provision for the permanent support of the judges is well-calculated, in addition to the tenure of their office, to give the requisite independence.")

166. *Kelly,* 247 F.3d at 887 (Beam, J., dissenting) (quoting THE ANTI-FEDERALIST PAPERS & THE CONSTITUTIONAL CONVENTION DEBATES 293 (Ralph Ketcham, ed., Mentor 1986)).

> Periodical appointments, however regulated, or by whomsoever made, would, in some way or the other, be fatal to [the judges'] necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the pleasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.[167]

The question of "independence" in the context of state judicial systems in which judges are chosen or retained periodically through judicial elections is much more complicated. As stated previously, in discussing the meaning of the term "independence" in the context of the federal system, the term is typically understood, as it was by Hamilton and Kent, to mean that judges, once appointed to the bench, are independent of – that is, not subject to control of or retaliation by -- the executive and legislative branches, i.e., those responsible for the nomination, confirmation, and compensation of the judges. In states in which judges are subject to periodic elections, however, the voters have chosen that their judges will be periodically held accountable for their conduct on the bench. Thus, to a great extent this arrangement lessens the "independence" of the judiciary from those who choose the judges, i.e., the voters. Indeed, as Hamilton noted, allowing judges to be elected or retained by the people would appear to be fatal to any notion that a judiciary so constituted is "independent." The question, then, is what does it mean for an elected judiciary to be "independent"? As stated by Judge Beam of the United States Court of Appeals for the Eighth Circuit, "[the term judicial independence] is subject to broad and varied interpretations, and merely begs the question 'independent from what?'"[168]

It should be fairly obvious that the answer to this question in states that elect judges cannot be that the judges are to be independent of the electorate. These judicial selection systems are *designed* to insure that judges are accountable to the people for their decisions, meaning that judges may, rightly or wrongly, be held to account for the decisions they make. Whether advisable or not, if a state has chosen this method of choosing and retaining judges, it cannot then suppress the speech of judges and candidates for judicial office in order to preserve an "independence" that, in fact, does not exist. That accountability to the electorate - not independence - is the purpose of elective judicial selection is well-illustrated by the debates over the judiciary during Minnesota's founding – debates that in fact mirrored those which occurred among the Founders of the Federal Constitution. Minnesota sought statehood on June 1, 1857, a period of great upheaval just three years before the Civil War. The Democrats who favored an appointive system of selecting judges sought to create a judiciary strong enough to "restrain the waves of popular excitement," and to insure that the judges "'represent no constituency'" and "'represent nothing except the abstract ideas of

167. THE FEDERALIST No. 78, at 471 (Clinton Rossiter, ed. 1961).

168. *Kelly,* 247 F.3d at 886 (Beam, J., dissenting). *See also id.* (noting that "different sovereigns give different meanings to the term 'independence'").

equity and justice.'"[169] The "popular excitement" that concerned the Democrats "were the popular sentiments of radical abolitionist fervor."[170] One delegate described having "'see[n] it in Wisconsin, in Iowa, and in all those States where popular excitement in reference to negro-worship and disunion has had its effects upon an elective judiciary.'"[171]

The Republicans, by contrast, favored an elected judiciary, so that the prevailing abolitionist sentiment in the state might provide a check upon judges who might otherwise rule in a manner inconsistent with that sentiment.[172] Those favoring an electoral system prevailed, and the arguments made in support of that system were well put by Delegate Emmett:

> We hear a great deal of talk about an independent Judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people . . .? I say . . . that in order to correct the errors of Judges – and it may be important to correct them,– the office should be made elective. . . . [I]f the people are incapable of selecting their Judges, they are also incapable of selecting the man who is to appoint the Judges. . . . The governor always selects men belonging to his own political party, while the people often select them regardless of parties.[173]

Similarly, Delegate Curtis responded to those arguing for an appointed judiciary: "'Is a sufficient argument in favor of an appointed Judiciary, that it is old? Is it all that can be said in its favor, that it has grown hoary by age and usurpation – because it is all covered from one end to the other by corruption and fraud?'"[174] Thus, Minnesota, like most states with elected judges, considered and explicitly rejected the notion of an independent judiciary – like the one chosen by the Federal Framers – and instead opted for a system in which the judges were subject to accountability to the people. To the extent that the canons are said to preserve this type of independence, it appears that in states with elected judges there is no such independence to preserve.

Courts reviewing the canons also appear to have used the term "independence" in another sense, as synonymous with the previously-discussed interests in preserving the integrity, impartiality, and fairness of the judiciary. That is, an "independent" judiciary is one that is not only independent of the other branches of government and the people, but is also "independent" of any predilection to prejudge cases, or of any undue influence that might arise because of public statements regarding anticipated conduct in office or disputed legal or political issues. To the extent that the canons are said to serve this aspect of judicial "independence," they fail to do so for the same reasons discussed above with respect to the synonymous interests in integrity, impartiality, and fairness.[175] Gagging judges or candidates for judicial office in no way preserves the actual or perceived independence of the judiciary.

169. *Id.* at 888 (quoting DEBATES & PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINN. 495-96 (1858).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 889.
174. *Id.*
175. *See* discussion, *supra,* pp. 37-41.

B. Are the Canons Narrowly Tailored to Serve a Compelling Governmental Interest?

Even assuming, however, that the speech restrictions in the canons actually serve the asserted compelling interests in preserving the actual and perceived integrity, impartiality, fairness, and independence of the judiciary, the canons are clearly not narrowly tailored to serve those ends without abridging more speech than necessary to achieve those ends.

1. The "Pledges and Promises" Clause

Canon 7 of the 1972 Code of Judicial Conduct, and Canon 5 of the Model Code, provide that a candidate for judicial office may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office."[176] The rule is absolute and unqualified: no pledges or promises whatsoever other than the faithful and impartial performance of the duties of office. As described by the Seventh Circuit in *Buckley,* the clause is:

> not limited to pledges or promises to rule a particular way in particular cases or classes of case; all pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office . . . . He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers.[177]

The rule thus reaches far beyond restricting pledges or promises of conduct in office that might reasonably be considered as affecting the impartiality, fairness, integrity, or independence of the judge if elected. A provision prohibiting pledges or promises to rule a particular way in specific pending or impending cases or classes of cases would serve the stated interests without suppressing pledges or promises that do not undermine those interests.[178]

2. The "Announce Clause"

Canon 7 of the Code of Judicial Conduct provides that a candidate for judicial office may not "announce his views on disputed legal or political issues."[179] As discussed previously, this provision has been interpreted to prohibit candidates from discussing virtually *any* issue other than basic biographical and professional information, and judicial candidates are routinely disciplined for discussing any issue that might be of interest to the electorate. Advisory boards on judicial ethics have construed the clause to prohibit candidates from discussing, *inter alia,* pretrial release, plea bargaining, criminal sentencing, capital punishment, abortion, gun control, the equal rights amendment, drug laws, gambling laws,

176. CODE OF JUDICIAL CONDUCT, Canon 7(B)(1)(c) (1972); MODEL CODE OF JUDICIAL CONDUCT, Canon 5(d)(i) (1990).
177. *Buckley,* 997 F.2d at 228.
178. *See* discussion, *infra* pp.51-53.
179. CODE OF JUDICIAL CONDUCT, Canon 7(B)(1)(c) (1972).

liquor laws, dram shop legislation, labor laws, property tax exemptions, condominium regulations, court rules, prior court decisions of other courts and the candidate's court, specific legal questions and hypothetical legal questions.[180] Nor may candidates announce their views on constitutional interpretation, stare decisis, statutory interpretation, the proper role of the judiciary, or any other issue that might bear on the candidate's fitness for judicial office. As described by the Seventh Circuit in *Buckley*:

> [A candidate] can say nothing in public about his judicial philosophy . . . . He cannot criticize *Roe v. Wade*. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability – or for that matter about laissez-faire economics, race relations, the war in Yugoslavia, or the proper direction of health-care reform. All these are disputed legal or political issues.[181]

This blanket prohibition is clearly much broader than necessary to preserve the actual or perceived integrity, independence, impartiality, and fairness of the judiciary. The rule makes no attempt to limit the prohibition to the discussion of issues that may come before the court in pending or impending cases, or to permit candidates to discuss issues pertaining to judicial philosophy and administration, issues the public clearly needs to know in order to make an informed decision in choosing their judges. As the United States District Court for the Northern District of Florida stated in striking down Florida's canon:

> While the court agrees with the defendants in this case that the State of Florida has a compelling interest in protecting the integrity of the judiciary, it cannot agree that a prohibition of all discussion of disputed legal and political issues is the most narrowly drawn means of protecting that interest. The canon at issue here does more than proscribe untruthful or deceptive announcements, or announcements concerning specific cases, or announcements which might be construed as particularized pledges or conduct, or announcements limited in some other relevant manner. Except for information about the candidate's background, it effectively proscribes announcements on almost every issue that might be of interest to the public and the candidates in a judicial race.[182]

Or, as Judge Beam stated in *Kelly*, "[t]he 'announce clause' . . . effectively bans campaigning itself."[183] The rule is, quite frankly, irrational.

3. Canon 5 of the 1990 Model Code

In the 1990 revision of the code, the "announce clause" was substantially modified by Canon 5, as the ABA was concerned that the announce clause was "'an

180. *See Buckley*, 997 F.2d at 230 (citing *McFadden, supra*, at 86-87).
181. *Id.* at 228 (citations omitted).
182. ACLU v. Florida Bar, 744 F. Supp. 1094, 1098 (N.D. Fla. 1990).
183. *Kelly*, 247 F.3d at 894 (Beam, J., dissenting).

overly broad restriction on speech.'"[184] Canon 5 of the Model Code prohibits candidates for judicial office from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[185] This modified rule is similar to an interpretation of the "announce clause" by some courts attempting to narrowly construe the rule in order to avoid striking it down. In *Kelly,* for example, the court of appeals upheld the district court's construction of the announce clause as applying only to public statements regarding "issues likely to come before [the candidates] as judges."[186]

But Canon 5, like the "announce clause" as construed in *Kelly,* still prohibits a candidate from discussing virtually any issue, because, as the Seventh Circuit noted in *Buckley*:

> [t]here is almost no issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction. The civil war in Yugoslavia? But we have cases in which Yugoslavs resist deportation to that nation on the ground that they face persecution from one or another side in that nation's multisided civil war; and some years ago the Illinois courts were embroiled in a custody fight involving a child who didn't want to return to the then Soviet Union with his Soviet parents.[187]

There is thus little, if any, difference between the scope of the "announce clause" (however construed) and Canon 5 of the 1990 Code. Both provisions go far beyond prohibiting candidates from making public statements that might undermine the actual or perceived integrity and independence of the judiciary, and for that reason are inconsistent with the First Amendment.

C. Are There Constitutional Alternatives to the Canons?

Various alternative canons have been drafted by commentators and courts which may be sufficiently tailored to survive scrutiny under the Supreme Court's First Amendment jurisprudence. One proposal, drafted by the Illinois Supreme Court following the *Buckley* decision, completely omits the "pledges and promises" clause and limits the "announce clause" by prohibiting only statements "that commit or appear to commit the candidate with respect to cases, controversies, or issues within cases that are likely to come before the court."[188] Unlike the "announce clause" and Canon 5 of the 1990 Model Code, this provision limits the reach of the rule to statements regarding cases and controversies (about which there is no serious dispute as to the constitutionality of the restriction), and to issues that are likely to arise *within cases* that are likely to come before the

184. *See* J. David Rowe, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech,* 73 TEX. L. REV. 597, 601 (1995) (quoting MODEL CODE OF JUDICIAL CONDUCT as Submitted for Consideration at the 1990 Annual Meeting of the House of Delegates of the American Bar Association, reprinted in American Bar Association, Report of the Standing Committee on Ethics and Professional Responsibility Concerning the Proposed Model Code of Judicial Conduct app. C at 72 (1990)).

185. *See* MODEL CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(ii) (1990).

186. 247 F.3d at 882.

187. 997. F.2d at 229.

188. ILL. SUP. CT. R. 67(A)(3)(d)(i) (emphasis added).

court. This presumably means that there must be some information available that would suggest to a candidate that the issue up for discussion is likely to come before the court if the candidate is elected. For example, if there is a major products liability case proceeding in the trial courts of a particular state, a candidate for the state supreme court should refrain from speaking about issues *within* that case, as they are likely to come before the state supreme court if the candidate is elected.

Perhaps a better-worded proposal was made by the author of a student note in the 1994 Chicago-Kent Law Review. In that article, Matthew J. O'Hara proposed the following rule narrowing Canon 5 of the 1990 Model Code:

A candidate for judicial office shall not:

> (i) make pledges or promises of conduct in office regarding any pending or impending proceeding before the candidate's court;
> (ii) make statements that commit or appear to commit the candidate with respect to pending or impending cases or controversies that may reasonably appear likely to come before the court.[189]

By limiting the scope of the rule to pledges, promises, or statements regarding "pending or impending cases or controversies," this rule would permit a candidate to discuss any disputed legal or political issues that are not reasonably likely to come before the candidate if he or she is elected. As described by the author, the rule would "allow discussion of any issue that was not pending or related to specific litigation with identified parties that is reasonably likely to come before a candidate's court."[190]

> Thus, "a supreme court judge of a state may readily assume that an appeal concerning a high profile murder conviction will likely reach the state's highest court, and will consequently avoid comment on any issues that have arisen in from of the trial court in the same case. However, although the candidate may not express a view on whether a specific defendant might receive the death penalty, he may express a view on capital punishment in general."[191]

This proposal would thus ensure that a candidate for judicial office does not make statements that might undermine the actual or perceived impartiality and fairness of the courts should the candidate be elected, while also ensuring that the public is provided with important information regarding the candidate's judicial philosophy and beliefs in order to make an informed choice among the candidates.

It is also important to note that even apart from the speech restrictions found in the canons, there exists a constitutionally-sound mechanism for ensuring that a biased or prejudiced judge does not sit in a particular cause: recusal. Most jurisdictions have recusal provisions similar to the federal recusal statute, which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned."[192] The statute also requires recusal when,

189. Matthew J. O'Hara, Note, *Restriction of Judicial Election Candidates' Free Speech Rights After Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT L. REV. 197, 229 (1994).
190. *Id.*
191. *Id.* at 230.
192. 28 U.S.C. § 455(a).

inter alia, the judge "has a personal bias or prejudice concerning a party."[193] In the event that a judicial candidate made public comments during an election that would reasonably cause the judge's impartiality to be questioned, the litigants are free to request recusal, and should the request be denied, the judge's ruling will be subject to appellate review. Relying on the recusal provisions would ensure that candidates are not prohibited from engaging in a fair discussion of legal and political issues during campaigns, while also ensuring that judges are not permitted to sit in proceedings in which their impartiality may be reasonably questioned.

VI. CONCLUSION

Whether judges should or should not be chosen by popular election is an issue that has been debated since the founding days of our Republic. Under the appointive system chosen at the federal level, judges are appointed by the President, with the advice and consent of the Senate, and hold their offices for life, thereby assuring the independence of the federal judiciary. Most states have opted for a different system, however, choosing to elect or retain some or all of their judges by periodic popular elections. The people of those states have valued accountability over independence, and have decided that they will decide who will be their judges.

Notwithstanding that decision, the courts of various states have adopted ethical proscriptions that prohibit candidates for judicial election from discussing virtually every issue that might be of interest to the electorate in choosing among the candidates for judicial office. The people, having decided that they are capable of selecting from among them those who would be their judges, are assumed to be incapable of processing the information necessary to make that selection. This situation was aptly described by the Kentucky Supreme Court, thus:

> Inasmuch as the purpose of an election is to give the electorate the opportunity to become informed on a judicial candidate's qualifications for the position, which would include, among other things, knowledge of the law, and personal views and beliefs, the Canon fails in this respect. Instead, we are encouraging the public to judge candidates for our judiciary by not much more than their appearances.[194]

Suppressing speech in this manner does not further the asserted interests in preserving the integrity, impartiality, and fairness of the judiciary. In fact, those goals are undermined by rendering judicial elections as little more than popularity contests, with the electorate choosing many of its most important leaders on the basis of mere biographical and professional information, or, as some research suggests, on completely arbitrary factors such as the sound of the candidate's name, the location of the candidate on the ballot, whether the candidate is the incumbent, and whether the candidate's name suggests a particular ethnic origin.[195]

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193. 28 U.S.C. § 455(a)(1).
194. *J.C.J.D.*, 803 S.W.2d at 956.
195. *See* STUMP & CULVER, *supra* note 3, at 46-47.

The First Amendment does not countenance this paternalistic (and irrational) attitude toward the electorate, especially considering the much less draconian alternatives that have been proposed. If the people – rightly or wrongly – have chosen to elect their judges, the people must be assumed to be competent to perform that task, and the candidates must be given the opportunity to provide the people with the information necessary to make an informed choice.